No.

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT DAVID TOWNSEND,

v. *Petitioner*

UNIVERSITY OF ALASKA, ET AL

Respondents

On Petition for Writ of Certiorari

To The United States Court of Appeals

for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The United States Court of Appeals for the Ninth Circuit dismissed the Appellant's claim for lack of subject matter jurisdiction. The Court held that reading the provision in U.S.C. 38 § 4323(b)(2) that "[a USERRA] action *may* be brought in a State court of competent jurisdiction in accordance with the laws of the State" in conjunction with the 11th Amendment's sovereign immunity provisions effectively limited such an action to State court.

The question for review is whether the United States Court of Appeals for the Ninth Circuit erred in concluding that Congress did *not* intend to provide an optional right of action in federal district court for USERRA actions brought by private persons against state employers and that such actions by private individuals against state employers are thus barred by the Eleventh Amendment's sovereign immunity provisions.

PARTIES TO THE PROCEEDING

I. Petitioner named herein is Robert David Townsend;

II. Respondents named herein are as follows: University of Alaska, University of Alaska at Fairbanks, Mike Setterberg, Terry Vrabec, Carolyn Chapman, Mike Hostina, Kathleen Schedler, P.E.,

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The opinion of the Court of Appeals is reported at 543 F.3d 478, and is reprinted in the Appendix to the Petition ("Pet. App.") at 21A-34A. The District Court's opinion is reported as 3:06-cv-000171, and is reprinted at Pet. App. 10A-20A.

JURISDICTION

The Court of Appeals entered its judgment on September 5, 2008. The District Court had jurisdiction of the case on the merits pursuant to 28 U.S.C. §§ 1331 and 38 U.S.C. §4323. The Court of Appeals had jurisdiction over this matter pursuant to 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTES INVOLVED

This case involves provisions of U.S.C. 38 § 4323(b)(2). The pertinent provisions are reproduced in the Appendix at Pet. App. 38 A.

STATEMENT OF THE CASE

This matter presents an opportunity for this most honorable Court to resolve a significant legal controversy which is vital to U.S. national security. That is, whether men and women serving in the Armed Forces of the United States are entitled to a right of action in federal district court against state employers under USERRA as well as the extent to which the Eleventh Amendment's Sovereign Immunity powers can be abrogated by USERRA

pursuant to Congress' Article I War Powers. Pet. App. 21A-34A. The outcome of this case is detrimental to the fair litigation of Uniformed Services Employment and Reemployment Act ("USERRA") cases across the United States.

The Ninth Circuit Court of Appeals found that a federal district court lacks jurisdiction over a USERRA action brought by an individual against a state as an employer. This errant conclusion was based upon the Court's reading of 38 U.S.C. §4323(b)(2) in conjunction with the Eleventh Amendment's sovereign immunity provisions.

38 U.S.C. §4323(b)(2) states only, "In the case of an action against a State (as an employer) by a person, the action ***may*** be brought in a State Court of competent jurisdiction in accordance with the laws of the State." The Court reasoned that the Eleventh Amendment's provision regarding sovereign immunity to "arms of the state" are applicable in a USERRA context and in this matter[1]. The Court further held that the term "may" was insufficient to to abrogate sovereign immunity and, accordingly, that any action brought against a State (as an employer) ***must*** be brought in a State Court.

As further detailed herein, such logic fails because subsequent Supreme Court opinions have held that, contrary to the case law relied upon by respondents, a grant of jurisdiction to state courts framed such that a plaintiff "may" bring or maintain a suit in state court does not grant exclusive jurisdiction to the state courts. Rather, general federal question or federal diversity jurisdiction statutes are still

[1] The Respondent, Alaska University, is considered an "arm of the state" for purposes of the Eleventh Amendment's sovereign immunity provisions according to the Ninth Circuit.

applicable to the matter. In this instance, the general federal question, or more correctly, "arising under" jurisdictional statute, 28 U.S.C. §1331, therefore supports the maintenance by federal court of jurisdiction over this matter. As further detailed in this Petition, there is also ample authority for the proposition that the Eleventh Amendment does not generally operate to bar the assertion of a USERRA claim against a state.

Furthermore, this matter presents important national implications. The just resolution of this case is fundamental to the enforcement and preservation of USERRA. The Ninth Circuit's refusal to hear the Petitioner's claim sets a dangerous trend in USERRA law as state-employers within those circuits are now able to engage in free-range discrimination against U.S. servicemen and women as they return to the civilian workforce. By stringently limiting access to suitable remedies and courts of proper jurisdiction, the Ninth Circuit's ruling discourages non-career military service. This result directly opposes one of the stated goals of USERRA, which is to encourage military service 38 U.S.C. §4301 (a)(1).

A. Factual Background

1. This matter is a claim brought by Mr. David Townsend against the University of Alaska and University of Alaska at Fairbanks (collectively "UAF" or "defendants") pursuant to the Uniformed Service Employment and Reemployment Rights Act of 1974, as amended ("USERRA"), 38 U.S.C. § 4301 et seq. Mr. Townsend worked in the power plant at the University of Alaska Fairbanks. On August 1, 2001, Mr. Townsend joined the Alaska Air National Guard.

He disclosed this fact to his supervisor at the University of Alaska Fairbanks on October 14, 2001. Pet. App. 3-A (Complaint at ¶¶ 9 and 10).

2. Mr. Townsend received orders and went on active duty for training from November 27, 2001 to May 14, 2002. Pet. App. 3-A (Complaint at ¶ 12.) On May 19, 2002, he reported for work but was informed by Mike Setterberg, his supervisor, then UAF Police Chief Terry Vrabec, and others that he was fired and was thus trespassing. When he objected, he was "rehired" as a janitor. Pet. App. 3A-4A (Complaint at ¶¶ 13-15.)

3. Over the following period of nearly two years various actions occurred which Mr. Townsend contends constituted a pattern of harassment or interference with his employment based on his military status. Pet. App. 4-A (Complaint at ¶¶ 16-18.) The details of these actions, however, are not important for the present Writ Application.

4. Mr. Townsend again went on active duty for training from May 27, 2003 through June 27, 2003. Pet. App. 5-A (Complaint at ¶¶ 19 and 20.) On October 9, 2003, via a letter signed by Kathleen Schedler, P.E., he was terminated from his employment with UAF for alleged threats and for allegedly making dishonest statements about his military obligations. Pet. App.6-A (Complaint at ¶ 23.)

5. Mr. Townsend contends that this action was really nothing more than a mere pretext for discrimination against him because of his military status and performance of his military duty, and this civil action was filed to seek redress for his resulting damages.

B. Proceedings Below

Petitioner commenced this action in federal district court against his former employer, the University of Alaska, alleging violations of USERRA[2]. The Petitioner invoked the district court's jurisdiction pursuant to 38 U.S.C. § 4323(b)(3), which provides that "[i]n the case of an action against a private employer by a person, the district courts of the United States shall have jurisdiction of the action." Neither party disputed that the University of Alaska is an arm of the State of Alaska.

The State moved to dismiss Petitioner's action, arguing that the federal district court lacked subject matter jurisdiction over a USERRA claim. The Respondent argued that USERRA's provision that "[i]n the case of an action against a State [employer] by a person, the action *may* be brought in a State court of competent jurisdiction in accordance with the laws of the State[3]," means that the federal district court lacks jurisdiction over a USERRA claim against a State-employer brought by a private individual and, essentially, such an action *must* be brought in state court. Accordingly, the district court granted the State's motion and dismissed the case for lack of jurisdiction. The Petitioner appealed to the Ninth Circuit Court of Appeals.

The Ninth Circuit affirmed the District Court's ruling, holding: (1) a federal district court lacks jurisdiction over a USERRA action brought by an individual against a state as an employer; (2)

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[2] Townsend alleged that he was fired from his job with the University because of his military status with the Alaska Air National Guard in violation of USERRA.

[3] 38 U.S.C. § 4323(b)(2)

USERRA does not create an express cause of action against individual state supervisors; and (3) USERRA does not create an implied cause of action against individual state supervisors.

The Ninth Circuit gave credence to the Respondent's arguments regarding the Eleventh Amendment's sovereign immunity provisions while denouncing the Petitioner's argument that Congress intended to abrogate the states' sovereign immunity for purposes of enforcing the provisions of USERRA. Pet. App. 28-A. The Court stated specifically,

> Although Congress may abrogate the states' sovereign immunity when Congress has unequivocally expresse[d] its intent to abrogate the immunity, and when Congress has acted 'pursuant to a valid exercise of power, (citations omitted) here, Congress has not unequivocally expressed an intent to abrogate the states' sovereign immunity in USERRA. The best Townsend can point to is the language in the Act that claims against a state "may" be brought in state court.

Id.

Although The Ninth Circuit acknowledged that the language of 38 U.S.C. § 4323(b)(2) is permissive, they held that such language is not equivocal enough to abrogate sovereign immunity, and thus excepted the University of Alaska, as well as all state-employers, within the boundaries of the Ninth Circuit from the provisions of USERRA.

REASONS FOR GRANTING THE PETITION

This matter is of great national importance. The just resolution of this case is fundamental to the enforcement and preservation of USERRA, which was designed to encourage non-career military service and thus strengthen our nation's military defense capabilities. Now that the force-projection of the United States is subject to intense national debate and the numbers of voluntary military enlistments are not assured, proper enforcement of USERRA is critical. However, the Ninth Circuit's refusal to hear the claims of private persons against state-employers allows such employers to freely discriminate against U.S. servicemen and women as they attempt to reenter the civilian workforce.

Furthermore, the Ninth Circuit's holding puts non-career servicemen and women's civilian jobs at even greater risk by limiting the remedies under USERRA for unlawful discharge. Ultimately, the ruling discourages the non-career military service of anyone currently or potentially employed by the state or any "arm of the state." This result is in direct contradiction of one of the stated goals of USERRA, which is to encourage military service. 38 U.S.C. §4301 (a)(1). As a simple matter of national security, the Petitioner's Writ of Certiorari should be granted.

I. THIS CASE RAISES THE CRITICALLY IMPORTANT QUESTION OF WHETHER CONGRESS INTENDED TO PROVIDE A RIGHT OF ACTION IN FEDERAL DISTRICT COURT FOR USERRA ACTIONS BROUGHT BY PRIVATE PERSONS AGAINST STATE EMPLOYERS OR WHETHER SUCH ACTIONS

ARE BARRED BY THE ELEVENTH AMENDMENT'S SOVEREIGN IMMUNITY PROVISIONS.

There is a pressing need for this Court to determine whether men and women serving in the Armed Forces of the United States have any right of action in federal district court against state employers under USERRA as well as the extent to which the Eleventh Amendment's Sovereign Immunity powers can be abrogated by USERRA pursuant to Congress' Article I War Powers. Due to conflicting case-law regarding changes made to USERRA in 1998, the answer to this question remains unclear under as the rights of U.S. servicemen and women hang in the balance.

II. DESPITE THE 1998 USERRA AMENDMENT, THERE IS FEDERAL JURISDICTION FOR A PRIVATE USERRA CLAIM AGAINST A STATE EMPLOYER.

The Ninth Circuit held that a 1998 amendment to USERRA deprives the federal courts jurisdiction over a particular class of USERRA claims, claims by individuals against states as employers. Pet. App. 28 A. As will be seen in detail herein, this conclusion fails because conflicting Supreme Court opinions have held that, contrary to the case law relied upon by Ninth Circuit, a grant of jurisdiction to state courts framed such that a plaintiff "may" bring or maintain a suit in state court does *not* grant *exclusive* jurisdiction to the state courts. Rather, general federal question or federal diversity jurisdiction statutes are still applicable to the matter. In this instance, the general federal question, or more correctly, "arising under"

jurisdictional statute, 28 U.S.C. §1331, therefore supports the maintenance by this Honorable Court of jurisdiction over this matter.

A. The Relevant Statutory Texts – Pre- and Post-1998 Revision

The starting point for an analysis of the jurisdictional issues presented in this matter is, of course, the statutory language. Prior to the 1998 revision of USERRA, the relevant portion of the statute provided:

> (b) **In the case of an action against a State as an employer, the appropriate district court is the court for any district in which the State exercises any authority or carries out any function.** In the case of a private employer the appropriate district court is the district court for any district in which the private employer of the person maintains a place of business.
>
> **(c)(1)(A) The district courts of the United States shall have jurisdiction, upon the filing of a complaint, motion, petition, or other appropriate pleading by or on behalf of the person claiming a right or benefit under this chapter--**
>
> (i) to require the employer to comply with the provisions of this chapter;
>
> (ii) to require the employer to compensate the person for any loss of

wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter; and

(iii) to require the employer to pay the person an amount equal to the amount referred to in clause (ii) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful.

38 U.S.C. §4323 (Pre-1998 amendment) (bold emphasis added).

The relevant portion of USERRA after the 1998 revision provides:

(b) **Jurisdiction.**--(1) In the case of an action against a State (as an employer) or a private employer commenced by the United States, the district courts of the United States shall have jurisdiction over the action.

(2) In the case of an action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State.

(3) In the case of an action against a private employer by a person, the district courts of the United States shall have jurisdiction of the action.

38 U.S.C. §4323 (Post-1998 amendment, current law) (bold emphasis added)

One critical point must be noted from the plain statutory text, and that is the statutory contraposition of the word "shall" in 38 U.S.C. §4323(b)(1) and (3) with the word "may" in 38 U.S.C. §4323(b)(2).

B. THE NINTH CIRCUIT'S JURISDICTIONAL CONCLUSION

At the heart of Ninth Circuit's is a simple proposition. Prior to the revision it was clear that all suits against states under USERRA, whether brought by an individual or by the government were to be brought in federal court because of the mandatory provision that, "district courts of the United States *shall* have jurisdiction . . . . " 38 U.S.C. §4323(c)(1)(a) (Pre-1998 amendment). According to the Ninth Circuit, when the statute was amended to provide that when a private person sues a State to assert a USERRA claim, "the action *may* be brought in a State court of competent jurisdiction in accordance with the laws of the State[,]" this amended provision gave exclusive jurisdiction over such claims to state courts.

The Ninth Circuit stated, "[W]e conclude that the district court correctly dismissed Townsend's suit against the State for lack of subject matter jurisdiction. Indeed, not only has Congress failed to evince an intent to abrogate the states' sovereign immunity, 'Congress's intention to limit USERRA suits against states to state courts is unmistakable.'" (quoting Velasquez v. Frapwell, 165 F.3d 593, 594 (7th Cir.1999) (per curiam)). Pet. App. 30-A.

The Valasquez per curiam opinion cited considered the matter in a very conclusory way, as

might be expected in a per curiam opinion. The per curiam opinion partially vacated the same court's earlier opinion as to Eleventh Amendment sovereign immunity on the grounds that the statutory revision deprived the court of jurisdiction to consider the matter. The relevant portion of the Valesquez per curiam opinion holds that:

> The amendment to USERRA, so far as bears on this case, adds a new section conferring only on state courts jurisdiction over suits against a state employer, 38 U.S.C. § 4323(b), and makes the new jurisdictional provision applicable to pending cases, Pub.L. No. 105-368, § 211(b)(1), and hence to this case. The defendants argue that jurisdiction continues in the federal courts under the general federal question jurisdictional statute, 28 U.S.C. § 1331, which section 211 of the statute amending USERRA does not purport to repeal. The argument has no merit; Congress's intention to limit USERRA suits against states to state courts is unmistakable; the defendant's arguments that this case was finally decided because the district court issued a final decision and so the amendment is inapplicable, and that if it is applicable it is unconstitutional, also plainly lack merit.
>
> We conclude that we lacked jurisdiction over the plaintiff's USERRA claim, though not over his other claim, which

> is under Title VII of the Civil Rights Act of 1974. We therefore vacate so much of our decision as relates to the state's Eleventh Amendment defense and, as is customary, United States v. Munsingwear, 340 U.S. 36, 41, 71 S.Ct. 104, 95 L.Ed. 36 (1950), we also vacate the relevant ruling by the district court.

Id. at 593-594.

C. TEXTUALLY, THE STATUTORY LANGUAGE DOES NOT SUPPORT THE NINTH CIRCUIT'S CONCLUSION

The Ninth Circuit, in its ruling, relied upon Williams v. United Airlines, Inc., 2007 WL 2458504 (9th Cir. Aug. 31, 2007) for the proposition that a statutory provision that a person "may" file a complaint with the Secretary of Labor is mandatory, and excludes the possibility of the complaining party under the WPP simply filing suit in federal court. Unlike the statute under examination in the present matter, however, the statute in Williams neither creates any private cause of action for relief in federal or state court, nor does it not contain "may" in contraposition to two uses of the word "shall." 49 U.S.C. §42121. Rather, this statutory provision provides a very detailed scheme for admistrative complaint, administrative remedies (including a corrective order by the Secretary of Labor), and only a private cause of action for enforcement of the Secretary of Labor's order should it not be heeded. Id. By way of comparison, it is clear that USERRA intends for individuals to have direct access to the courts for relief, the only question is whether an

individual may pursue their private right of action against a state entity in federal court.

The Ninth Circuit rejected Petitioner's argument that the permissive language regarding state jurisdiction in such cases means that Congress also intended to grant federal jurisdiction,

> In Williams v. United Airlines, Inc., 500 F.3d 1019, 1022 (9th Cir.2007), we concluded that a statute stating that a person "may" file an administrative complaint with the Secretary of Labor did not mean that a complaint could be filed with the Secretary of Labor and with the federal district court. And in Murphey v. Lanier, 204 F.3d 911, 914 (9th Cir.2000), we held that because federal jurisdiction is limited to that conferred by Congress, a statute stating that an action "may" brought in state court "does not mean that federal jurisdiction also exists; instead, the failure to provide for federal jurisdiction indicates that there is none." Thus, Congress' use of the permissive "may" with respect to bringing suit in some other forum does not evince an intent to grant federal jurisdiction over actions brought by individuals against states, and it certainly does not evince an intent to abrogate the states' sovereign immunity.

Pet. App. 32-A (quoting Dellmuth v. Muth, 491 U.S. 223, 230, 109 S.Ct. 2397, 105 L.Ed.2d 181 (1989)).

There is, *however*, a firm basis for federal jurisdiction over any case arising under a federal statute, such that there is more than just the absence of a grant of jurisdiction contained in 28 U.S.C. § 1331. There is, significantly, a mandate by Congress that federal statutory matters be heard in federal court. That authority is, of course, that, federal courts have a duty to adjudicate the cases and controversies before them and a "virtually unflagging duty" to exercise federal jurisdiction when it exists. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976)

Furthermore, there is a significant body of Supreme Court case law supporting the notion that the word "may" in this instance is not mandatory, but is permissive. In particular, interpreting the word "may" in statutory language as being discretionary, not mandatory, is appropriate when, as is the case in the present matter, it is found in close proximity to other clauses containing the word "shall". The Supreme Court has held that, "The word "may" customarily connotes discretion. That connotation is particularly apt where, as here, "may" is used contraposition to the word "shall[.]"" Jama v. ICE, 543 U.S. 335, 125 S.Ct. 694, 703, 160 L.Ed.2d 708 (2005) (internal citation omitted); see also, Martin v. Franklin Capital Corp., 546 U.S. 132, 126 S.Ct. 704, 708-709, 163 L.Ed.2d 547 (2005) (the word "may" connotes discretion where the statute has in other instances used the word "shall"), Lopez v. Davis, 531 U.S. 230, 241, 121 S.Ct. 714, 148 L.Ed.2d 635 (2001) (reasoning that "Congress' use of the permissive 'may' in one section contrasts with the

legislators' use of a mandatory 'shall' in the same section").

In the present version of the statute the use of the word "may" is in perfect contraposition to the two bracketing clauses containing the mandatory "shall". Following the Supreme Court's holding in, the only logical conclusion is that the "may" contained in the current version of 28 U.S.C. 4323(b)(2) is merely discretionary, such that the plaintiff could have brought his suit in state court if he so elected, but does not serve to require that the plaintiff bring his claim in state court.

D. More Recent Supreme Court Case Law Has Clarified That Grants Of Jurisdiction Containing "May" Are Discretionary, Not Mandatory

Well after the per curiam decision in Valesquez that underlies the Ninth Circuit's decision in this matter, the very same circuit, the Seventh Circuit, considered the subsequent development of the law concerning grants of jurisdiction to state courts in federal statutory clauses containing the word "may." Moreover, in its later opinion the Seventh Circuit considered the impact of a later Supreme Court case, Breur v. Jim's Concrete of Brevard, Inc., 538 U.S. 691, 123 S.Ct. 1882, 155 L.Ed.2d 923 (2003). It is important to note that Breur was rendered after the Ninth Circuit TCPA case relied upon by the defendants below, Murphey v. Lanier, 204 F.3d 911 (9th Cir. 2000), for the proposition that statutory language that a plaintiff "may" pursue a claim in state court precludes federal jurisdiction.

In Brill v. Countrywide Home Loans, Inc., 427 F.3d 446 (7th Cir. 2005), the court considered whether federal jurisdiction existed for a private

claim brought under the Telephone Consumer Protection Act. The Seventh Circuit's in depth consideration of the matter is worth quoting at length as it is directly applicable to the present matter:

That the controversy exceeds $5 million is insufficient, however, if state courts have exclusive jurisdiction to resolve suits under the Telephone Consumer Protection Act. The district judge relied on § 227(b)(3), which provides:

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State-
(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,
(B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or
(C) both such actions.
If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

This is the only portion of § 227 that expressly creates a private right of action, and from its failure to authorize litigation in federal court the district judge inferred that state jurisdiction must be exclusive. Six courts of appeals have come to similar conclusions-though they deal only with the question

whether suit to enforce the Telephone Consumer Protection Act may be filed or removed under the federal-question jurisdiction, see 28 U.S.C. § 1331, and not whether such a suit may be removed under the diversity jurisdiction. See Foxhall Realty Law Offices, Inc. v. Telecommunications Premium Services, Ltd., 156 F.3d 432 (2d Cir.1998); ErieNet, Inc. v. Velocity Net, Inc., 156 F.3d 513 (3d Cir.1998); International Science & Technology Institute, Inc. v. Inacom Communications, Inc., 106 F.3d 1146 (4th Cir.1997); Chair King, Inc. v. Houston Cellular Corp., 131 F.3d 507 (5th Cir.1997); Murphey v. Lanier, 204 F.3d 911 (9th Cir.2000); Nicholson v. Hooters of Augusta, Inc., 136 F.3d 1287 (11th Cir.1998). But if state jurisdiction really is "exclusive," then it knocks out § 1332 as well as § 1331.

These decisions can not be reconciled with either Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing, --- U.S. ----, 125 S.Ct. 2363, 162 L.Ed.2d 257 (2005), or Breuer v. Jim's Concrete of Brevard, Inc., 538 U.S. 691, 123 S.Ct. 1882, 155 L.Ed.2d 923 (2003), both of which came after all of the six decisions to which we have referred. Grable resolved a conflict in the Supreme Court's own decisions by holding that federal jurisdiction does not depend on the existence of a private right of action under federal law. And Breuer held that statutory permission to litigate a federal claim in state court does not foreclose removal under the federal-question jurisdiction.

The Fair Labor Standards Act provides that a plaintiff may "maintain" an action in either state or federal court, and Breuer insisted that a right to "maintain" an action in state court forecloses its

removal. The Justices concluded, however, that a plaintiff's right to litigate in state court does not block a defendant from electing a federal forum, because 28 U.S.C. § 1441(a), the general removal provision, allows the defendant to remove any claim under federal law (or supported by diversity of citizenship) "[e]xcept as otherwise expressly provided by Act of Congress". The word "maintain" in the FLSA is not an "express" prohibition on removal, Breuer held.

Brill, 427 F.3d at 449-450 (bold emphasis added).

The Seventh Circuit goes on to note the similar role of contraposition between mandatory and permissive clauses in Brill as follows:

Section 227(b)(3) does not say that state jurisdiction is "exclusive"-but another part of § 227 does use that word. Section 227(f)(1) permits the states themselves to bring actions based on a pattern or practice of violations. Section 227(f)(2) continues: "The district courts of the United States, the United States courts of any territory, and the District Court of the United States for the District of Columbia shall have exclusive jurisdiction over all civil actions brought under this subsection." How strange it would be to make federal courts the exclusive forum for suits by the states, while making state courts the exclusive forum for suits by private plaintiffs. But then § 227(f)(2) is explicit about exclusivity, while § 227(b)(3) is not; the natural inference is that the state forum mentioned in § 227(b)(3) is optional rather than mandatory. Likewise the proviso that actions may be filed in state court "if otherwise permitted by the laws or rules of court of a State"

implies that federal jurisdiction under § 1331 or § 1332 is available; otherwise where would victims go if a state elected not to entertain these suits? Our point is not that the reference to exclusive jurisdiction in § 227(f)(2) shows that "Congress knows how" to limit litigation to one set of courts-references to the subjective knowledge of a body with two chambers and 535 members, and thus without a mind, rarely facilitate interpretation-but that differences in language within a single enactment imply differences in meaning as an objective matter. See Akhil Reed Amar, Intratextualism, 112 Harv. L.Rev. 747 (1999). The contrast between § 227(f)(2) and § 227(b)(3) is baffling unless one provides exclusivity and the other doesn't.

Brill, 427 F.3d at 451 (bold emphasis added).

The logic of the Seventh Circuit in Brill is clear, and is in accord with the textual analysis of the statute that the amendment simply provides another forum option for a plaintiff without affecting the general rules of federal jurisdiction. As noted by the Supreme Court with regard to the Fair Labor Standards Act, and after examining a variety of exclusive jurisdiction provisions, in Breur v. Jim's Concrete of Brevard, Inc., 538 U.S. 691, 123 S.Ct. 1882, 155 L.Ed.2d 923 (2003), and equally applicable to the present matter:

When Congress has "wished to give plaintiffs an absolute choice of forum, it has shown itself capable of doing so in unmistakable terms" It has not done so here.

Id., 123 S.Ct. at 1885-1886.

Considering the foregoing, plaintiff respectfully submits that it is clear that his claim is one for relief pursuant to USERRA, a federal statute. Congress authorized jurisdiction in federal district courts "of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Thus, the federal courts properly have jurisdiction over this matter.

The District Court, in a footnote to its opinion, took a narrow view of Breur, describing it as inapposite. The legal analogy to the present matter, however, whether a permissive "may" in favor of state court in a federal jurisdictional provision is mandatory is both simple and clear. Additionally, the District Court completely ignored the explanation and application of Breur in Brill.

That plaintiff has elected not to bring his suit in state court is his right, but it does not defeat federal jurisdiction. The defendants' arguments are, without substance in that they are based on a per curiam opinion that gives no analysis. Moreover, the very same circuit which issued the opinion at the root of defendants' argument has subsequently recognized that the Supreme Court has reached the opposite conclusion in analogous cases concerning federal jurisdiction. Therefore, the plaintiff respectfully urges the Court to find that federal jurisdiction has been established in this matter.

E. The Eleventh Amendment Does Not Bar a USERRA Claim.

Although not reached by the District Court, the defendants urged that the plaintiffs claims are

barred by the Eleventh Amendment. In making this argument the defendants relied on two sources of authority.

First, the primary authority relied upon by the defendants is the original, now partially vacated, opinion in Valasquez v. Frapwell, 160 F.3d 389 (7th Cir. 1998), vacated in part, 165 F.3d 593 (1999). In any event, it should be noted that the very portion of the opinion relied upon by defendants for support of their Eleventh Amendment sovereign immunity argument is no longer valid law according to the very court which issued the opinion. Second, the defendants also relied on the Supreme Court's holding in Seminole Tribe of Florida v. Florida, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) that Congress could not regulate Indian Gaming pursuant to its Article I powers. Seminole in no way addressed Congress's Article I War Powers.

Contrary to Seminole Tribe, in Alden v. Maine, 527 U.S. 706 (1999), the Court held that what is known as Eleventh Amendment immunity is actually a preexisting fundamental aspect of the states pre-ratification sovereignty, subject to alteration by the "plan of the [Constitutional] Convention or certain constitutional Amendments. Id. at 713. The logical extension of the Alden Court's conclusion was that, contrary to the Court's dicta in Seminole Tribe, Article I powers could in fact abrogate sovereign immunity: "In exercising its Article I powers Congress may subject the States to privates suits in their own courts only if there is 'compelling evidence' that the States were required to surrender this power to Congress pursuant to Constitutional design." See Id. at 730-31.

In 2006 in Central Virginia Community College v. Katz, 546 U.S. 356 (2006), specifically held that Congress could abrogate sovereign immunity pursuant to its Article I powers, holding that the Article I, §8 Bankruptcy Clause represents one such power. In doing so, the Court retracted its Seminole Tribe reasoning completely, stating:

> We acknowledge that statements in both the majority and the dissenting opinions in Seminole Tribe reflected an assumption that the holding in that case would apply to the Bankruptcy Clause. Careful study and reflection have convinced us, however, that that assumption was erroneous. For the reasons stated by Chief Justice Marshall in Cohens v. Virginia, 6 Wheat. 264, 5 L. Ed. 257 (1821), we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.

See Katz, 546 U.S. at 363.

Following the Court's reasoning in Alden that "limits implicit in the constitutional principle of sovereign immunity strike the proper balance between the supremacy of federal law and the separate sovereignty of the States," see Alden, 527 U.S. at 710, the Katz Court opened a clear avenue to overcome state assertions of sovereign immunity pursuant to Article I powers, on the basis of implied waiver. Under the newly articulated standard, waiver of sovereign immunity need not be as explicit as consent, nor must Congress even expressly abrogate state immunity.

Like the Bankruptcy Clause at issue in Katz, it is also appropriate to presume that the Framers of the

Constitution were familiar with the contemporary legal context when the war powers clauses were adopted. The Katz Court emphasized that the need for uniformity in bankruptcy was the historical basis upon which the Bankruptcy Clause was adopted, indicating the States' waiver of immunity in that arena. See Id. at 366, 368. Similarly, it has long been held that "the common defense was one of the purposes for which the people ordained and established the Constitution [such that] we need not refer to the numerous statutes that contemplate defense of the United States, its Constitution and laws, by armed citizens." See United States v. Macintosh, 283 U.S. 605, 620 (1931), thus furnishing a similar basis upon which States' should be deemed to have waived immunity in the war powers context.

Finally, the principle that Congress' war powers were intended to be complete and absolute when written into the Constitution has long been recognized by the Supreme Court, another indication that States' waived their immunity when the war powers were ratified:

Whatever tends to lessen the willingness of citizen to discharge their duty to bear arms in the country's defense detracts from the strength and safety of the government ... The Constitution, therefore, wisely contemplating the ever-present possibility of war, declares that one of its purposes is to 'provide for the common defense.' In express terms Congress is empowered 'to declare war,' which necessarily connotes the plenary power to wage war with all the force necessary to make it effective; and 'to raise armies' (Const. Art. 1 §8, cl. 11, 12), which necessarily connotes the like power to say who shall serve in them and in what way.

See Id. at 622.

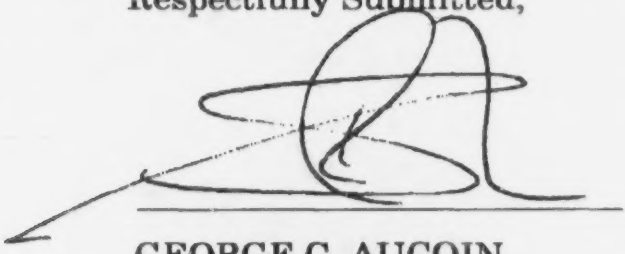
Thus, there is ample authority for the proposition that the Eleventh Amendment does not generally operate to bar the assertion of a USERRA claim against a state.

CONCLUSION

Mr. Townsend respectfully urges the Court to reverse the Ninth Circuit Court of Appeals and remand his case for further proceedings. The "may" term in the USERRA statute jurisdictional provision is permissive, particularly in light of its relationship to the two mandatory "shall" provisions that bracket it. Additionally, the District Court erred in denying the Motion for Leave to File the First Supplemental and Amending Complaint. The proposed amended pleading would have named Mr. Townsend's individual supervisors. USERRA is unique among federal employment statutes in allowing for suits against individual supervisors. The only other court to consider whether suits against individual supervisor defendants of a state employee when the state could not be sued in federal court held that they could. In sum, this approach does not do violence to the statute. Rather, it maximizes the chance that a servicemember can seek relief for discrimination against him on the basis of his military service. Underlying all of this case is the public policy in favor of supporting our military servicemembers in time of war. This policy is perhaps the most

important reason for allowing this suit to proceed in Mr. Townsend's chosen forum, federal court.

Respectfully Submitted,



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APPENDIX - A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT DAVID TOWNSEND,
Plaintiff-Appellant,

v.

UNIVERSITY OF ALASKA;
UNIVERSITY OF ALASKA AT
FAIRBANKS,
Defendants-Appellees.

No. 07-35993
D.C. No.
CV 06-0171 TMB
OPINION

Appeal from the United States District Court
for the District of Alaska
Timothy M. Burgess, District Judge, Presiding

Argued and Submitted
August 7, 2008 – Anchorage, Alaska

Filed September 5, 2008

Before: Dorothy W. Nelson, A. Wallace Tashima, and
Raymond C. Fisher, Circuit Judges.

Opinion by Judge Tashima

COUNSEL

Donald L. Hyatt, II, New Orleans, Louisiana, for the plaintiff-appellant.

William B. Schendel, Fairbanks, Alaska, for the defendants-appellees.

OPINION

TASHIMA, Circuit Judge:

Robert David Townsend sued his former employer, the University of Alaska, Fairbanks, in federal district court, alleging violations of the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA" or the "Act"), 38 U.S.C. §§ 4301-4333. The district court dismissed his action, concluding that it lacked jurisdiction over a USERRA claim brought by an individual against an arm of the state. The district court also denied Townsend's motion to amend his complaint to add individual state supervisors as defendants, reasoning that such an amendment would be futile because the court would still lack jurisdiction over the amended complaint. Townsend timely appealed.

We must decide whether a federal district court has jurisdiction over an USERRA action brought by an individual against an arm of a state, and whether USERRA creates a private right of action against individual state supervisors. We hold that a federal district court lacks jurisdiction over a USERRA action brought by an individual against a state and that USERRA does not create a cause of action against state employee-supervisors. We thus affirm the district court.

I. JURISDICTION

The district court dismissed this action for lack of jurisdiction. Whether that dismissal was proper is the primary issue on appeal. The district court, of course, had jurisdiction to determine whether it has jurisdiction. *See, e.g., Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126, 127 (1804). We have jurisdiction pursuant to 28 U.S.C. § 1291.

II. BACKGROUND

Townsend commenced this action in federal district court against his former employer, the University of Alaska ("State" or "University"), alleging violations of USERRA. Townsend alleged that he was fired from his job with the University because of his military status with the Alaska Air National Guard in violation of USERRA. Townsend invoked the district court's jurisdiction pursuant to 38 U.S.C. § 4323(b)(3), which provides that "[i]n the case of an action against a private employer by a person, the district courts of the United States shall have jurisdiction of the action." It is undisputed that the University is an arm of the State of Alaska.

The State moved to dismiss, contending that the federal district court lacked subject matter jurisdiction over Townsend's USERRA claim. The State argued that the Act's provision that "[i]n the case of an action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State," 38 U.S.C. § 4323(b)(2), means that the federal district court lacks jurisdiction over a USERRA claim against a "State (as an employer)" brought by a private individual. The district court granted the State's motion and dismissed the case for lack of jurisdiction.

Townsend then moved to amend his complaint to include individual supervisors as additional defendants. The district court denied leave to amend, reasoning that such an amendment would be futile because jurisdiction would still be lacking after concluding that USERRA does not create a cause of action against individual state supervisors.

Townsend timely appeals both the dismissal and the denial of leave to amend.

III. STANDARD OF REVIEW

The existence of subject matter jurisdiction is a question of law we review *de novo*. *See, e.g., United Transp. Union v. Burlington N. Santa Fe R.R. Co.*, 528 F.3d 674, 677 (9th Cir. 2008). Our review of whether a statute creates a private cause of action is also *de novo*. *See Crow Tribe of Indians v. Camp-bell Farming Corp.*, 31 F.3d 768, 769 (9th Cir. 1994).

IV. ANALYSIS

A. Statutory Background

[1] USERRA forbids employment discrimination on the basis of membership in the armed forces. 38 U.S.C. §§ 4301(a)(3), 4311(a). An employer violates USERRA if an employee's membership or obligation for service in the military is a motivating factor in an employer's adverse employment action taken against the employee, unless the employer can prove that the action would have been taken in the absence of such membership or obligation. *See id.* § 4311(c)(1); *Leisek v. Brightwood Corp.*, 278 F.3d 895, 898 (9th Cir. 2002). To enforce it's provisions, USERRA authorizes private suits for damages or injunctive relief against the employer, including a state employer. 38 U.S.C. §§ 4303(4)(A)(iii), 4323(a)(2), (b)(2), (d)(3).

[2] Before the 1998 amendments to USERRA, the Act provided that "[t]he district courts of the United States shall have jurisdiction" over all USERRA actions, including those brought by a person against a State employer. See Pub. L. No. 103-353, § 2, 108 Stat. 3149, 3165 (1994), *amended by* Pub. L. No. 105-368, § 211(a), 112 Stat. 3315, 3329 (1998). The venue provision then provided that "[i]n the case of an action against a State as an employer, the appropriate district court is the court for any district in which the State exercises any authority or carries out any function." *Id.*

[3] In 1998, Congress enacted the Veterans Programs Enhancement Act of 1998, making substantial changes to the jurisdiction and venue provisions of USERRA. The amended jurisdictional provision now provides that "[i]n the case of an action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State". 38 U.S.C. § 4323(b)(2). The amended Act provides for federal jurisdiction over "an action against a State (as an employer) or a private employer commenced by the United States," and "an action against a private employer by a person." *Id.* § 4323(b)(1), (3). In cases in which the Attorney General believes that a State has not complied with USERRA, the amended version provides that the United States can be substituted for an individual service member as the plaintiff in enforcement actions. *Id.* § 4323(a). The federal district court has jurisdiction over such an action. *Id.* § 4323(b)(1).

The venue provision was also amended. It now provides that "[i]n the case of an action by the United States against a State (as an employer), the action may proceed in the United States district court for any district in which the State exercises any authority or carries out any function." *Id.* § 4323(c)(1). "In the case of an action against a private employer, the action may proceed in the United States district court for any district in which the private employer of the person maintains a place of business." *Id.* § 4323(c)(2). The Act, as amended, includes no venue provision for an action by a private person against a State (as an employer).

[4] The legislative history of the 1998 amendments con-firms that Congress intended that actions brought by individuals against a state be commenced in state court. The underlying reason for these amendments was that Congress was concerned about the Supreme Court's then-recent decision in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). In Seminole Tribe, the Court held that Congress may abrogate a state's sovereign immunity only when acting pursuant to it's powers under § 5 of the Fourteenth Amendment, and not when it is acting pursuant to it's Commerce Clause powers. *Id.* at 59, 72-73. Following *Seminole Tribe*, the validity of USER-RA's abrogation of state sovereign

immunity was in doubt. *See* 144 Cong. Rec. H1396-02, H1398 (daily ed. Mar. 24, 1998) (Statement of Rep. Evans) ("[S]everal courts have held the reasoning of the Seminole Tribe case precludes federal court jurisdiction of claims to enforce federal rights of State employees under the Uniformed Service Employment and Re-employment Rights Act (USERRA).").

H.R. 3213, the jurisdictional provisions of which survive in the current version of 38 U.S.C. § 4323, was introduced on the House floor on March 24, 1998. *See* 144 Cong. Rec. H1396-02 (1998); *see also* H.R. 3213, 105th Cong. (1998). The stated purpose of the bill was, in part, "to clarify enforcement of veterans" employment and reemployment rights with respect to a State as an employer." 144 Cong. Rec. at H1396; *see also* H.R. 3213. The summary of the bill in the Report of the House Committee on Veterans' Affairs provides further insight into Congress' intent:

> This bill would substitute the United States for an individual veteran as the plaintiff in enforcement actions in cases where the Attorney General believes that a State has not complied with USERRA. Since the Attorney General, through U.S. Attorneys, is already involved in enforcing this law, the enactment of H.R. 3213 will not impose any new duties on the Attorney General. *Individuals not represented by the Attorney General would be able to bring enforcement actions in state court.*

H.R. Rep. No. 105-448, at 2 (1998) (emphasis added), *available at* 1998 WL 117158.

[5] The House Report thus makes plain that the purpose of the bill was to solve the *Seminole Tribe* problem by: (1) substituting the United States for the service member in suits

brought against states in federal court;[1] and (2) directing actions brought by individual service members, who were not represented by the United States, to state court.[2] *See* H.R. Rep. No. 105-448, at 2-5 (discussing the problems created by *Seminole Tribe* for USERRA's enforcement scheme and the proposed solution); *see also* 144 Cong. Rec. at H1398 (statement of Rep. Quinn) ("This bill would substitute the United States for an individual veteran as the plaintiff in enforcement actions in cases where the Attorney General believes that a State has not complied with USERRA... Individuals not represented by the Attorney General would be able to bring enforcement actions in State court.") The legislative history is devoid of any statement or suggestion that Congress intended to authorize individuals to bring actions against states in federal court or to enact a cause of action against the employee's supervisors in their individual capacity.

B. Individual Claims Against a State

[6] Despite the structure of the 1998 amendments' remedial scheme and it's legislative history, Townsend contends that USERRA provides for federal court jurisdiction for an action brought by a private individual against the University. He argues that Congress intended to retain federal court jurisdiction over USERRA claims brought by private individuals against an arm of the State. The Eleventh Amendment, how-ever, bars federal jurisdiction over suits against an unconsenting state by its own citizens. *See Hans v. Louisiana,* 134 U.S. 1, 15 (1890); *accord Seminole Tribe*, 517 U.S. at 54.

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1 An action by the United States against a state in federal court is not barred by the Eleventh Amendment. See United States v. Mississippi, 380 U.S. 128, 140-41 (1965).

2 Congress did not use the terms "must" or "shall" with respect to state court jurisdiction over USERRA claims for the apparent reason that "the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts." Alden v. Maine, 527 U.S. 706, 712 (1999); cf. ErieNet, Inc. v. Velocity Net, Inc., 156 F.3d 513, 516 (3d Cir. 1998) ("While state courts would have had jurisdiction over private [Telephone Consumers Protection Act] actions even if Congress had made no reference to state courts, we conclude that Congress referred these claims to state court as forcefully as it could, given the constitutional difficulties associated with Congress' mandating a resort to state courts.").

[7] Although Congress may abrogate the states' sovereign immunity when "Congress has 'unequivocally expresse[d] it's intent to abrogate the immunity," and when "Congress has acted 'pursuant to a valid exercise of power,'" *Seminole Tribe*, 517 U.S. at 55 (quoting *Green v. Mansour*, 474 U.S. 64, 68 (1985)); *accord Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1184-85 (9th Cir. 2003), here, Congress has not unequivocally expressed an intent to abrogate the states' sovereign immunity in USERRA. The best Townsend can point to is the language in the Act that claims against a state "may" be brought in state court. *See* 38 U.S.C. § 4323(b)(2). Based on that language, Townsend argues that Congress impliedly intended to authorize private actions against states in federal court.

[8] We have, however, on at least two occasions, explicitly rejected the argument that permissive language regarding another forum's jurisdiction means that Congress also intended to grant federal jurisdiction. In *Williams v. United Airlines, Inc.*, 500 F.3d 1019, 1022 (9th Cir. 2007), we concluded that a statute stating that a person "may" file an administrative complaint with the Secretary of Labor did not mean that a complaint could be filed with the Secretary of Labor and with the federal district court. And in *Murphey v. Lanier*, 204 F.3d 911, 914 (9th Cir. 2000), we held that because federal jurisdiction is limited to that conferred by Congress, a statute stating that an action "may" brought in state court "does not mean that federal jurisdiction also exists; instead, the failure to provide for federal jurisdiction indicates that there is none." Thus, Congress' use of the permissive "may" with respect to bringing suit in some other forum does not evince an intent to grant federal jurisdiction over actions brought by individuals against states, and it certainly does not evince an intent to abrogate the states' sovereign immunity. *See Dellmuth v. Muth*, 491 U.S. 223, 230 (1989) ("[E]vidence of congressional intent must be both unequivocal and textual."); *see also Seminole Tribe*, 517 U.S. at 55 ("Congress' intent to abrogate the States' immunity from suit must be obvious from a clear legislative statement.") (internal quotation marks and citations omitted).[3]

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3 By way of contrast, the pre-1998 version of USERRA did evince a clear congressional intent to abrogate sovereign immunity. It provided that "[t]he district courts of the United States shall have jurisdiction" over all USERRA actions, including those brought by a person against a State

[9] Townsend also argues in passing that 28 U.S.C. § 1331, the general federal question jurisdictional statute, grants jurisdiction over USERRA claims brought against a state by an individual, and thereby evinces an intent to abrogate the states' sovereign immunity. Section 1331, however, "does not itself purport todirect federal courts to ignore a State's sovereign immunity." *Seminole Tribe*, 517 U.S. at 86 (Stevens, J., dissenting).

[10]Thus, we conclude that the district court correctly dismissed Townsend's suit against the State for lack of subject matter jurisdiction. Indeed, not only has Congress failed to evince an intent to abrogate the states' sovereign immunity, "Congress's intention to limit USERRA suits against states to state courts is unmistakable." *See Velasquez v. Frapwell*, 165 F.3d 593, 594 (7th Cir. 1999) (per curiam).[4]

C. Claims Against Individual Supervisors

[11]Next, Townsend contends that the district court erred in denying him leave to amend his complaint in order to name state employee-supervisors in their individual capacities as defendants. These individual defendants, according to Town-send, also violated his USERRA rights.[5] Federal Rule of Civil Procedure

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employer. *See* Pub. L. No. 103-353 § 2, 108 Stat. 3149, 3165 (1994). But, as we have noted in Part IV.A, *supra*, concerned about the teaching of *Seminole Tribe*, Congress repealed that provision

4 The Fifth Circuit also recently held that the statute does not "allow[ ] individuals to bring USERRA claims against states as employers in federal court." *McIntosh v. Partridge*, 2008 WL 3198250, at *4 (5th Cir. Aug. 8, 2008). Although the suit was brought against an individual in both his individual and official capacities, *see id.* at *1, the court analyzed the case as if it were an action against the state and not an individual defendant.

5 If Townsend attempted to sue the state officials in their official capacity, he would still face the bar of sovereign immunity. The Eleventh Amendment's bar remains effective, if somewhat less absolute, in cases where state officials, instead of the State itself, are the subjects of suit. "Generally speaking, 'a suit [brought] against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself.'" *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 952 (9th Cir.

15(a)(2) provides that leave to amend shall be freely granted "when justice so requires." Leave to amend need not be granted, however, where the amendment would be futile. Jackson v. Bank of Haw., 902 F.2d 1385, 1388 n.4 (9th Cir. 1990) (citing Foman v. Davis, 371 U.S. 178, 182 (1962)). We agree with the district court that the amendment would be futile, but for somewhat different

reasons that we discuss below. See Atel Fin. Corp. v. Quaker Coal Co., 321 F.3d 924, 926 (9th Cir. 2003) (per curiam) ("We may affirm a district court's judgment on any ground supported by the record, whether or not the decision of the district court relied on the same grounds or reasoning we adopt"). Section 4323 does not create either an express or implied cause of action against individual state supervisors.[6] Accordingly, Townsend's proposed amended complaint would still fail to state a claim against those defendants.

1. Express Cause of Action

[12]USERRA expressly creates only two private causes of action: (1) an action brought by an individual against a State (as an employer), which as we have noted, may be brought in state court; and (2) an action brought against a private employer, which may be brought in both state and federal court. See 38 U.S.C. § 4323(a)(2). Despite the plain text of the statute, Townsend argues that USERRA also creates a cause of action against the supervisors, because the Act defines "employer" to

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2008) (alteration in the original and quoting *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71(1989)).

6 The district court stated that the "naming of individual state employees does not cure the subject matter jurisdiction defect." (Emphasis added.) It is "firmly established . . . that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction" under 28 U.S.C. § 1331. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998). Therefore, although we agree with the district court that USERRA does not create a cause of action against individual state supervisors, we do not view Townsend's proposed claim against them as so "wholly insubstantial and frivolous" or "foreclosed by prior decisions of this Court," see id., that federal question jurisdiction would not lie. The basis for futility is more accurately characterized as a failure to state a claim for relief, see Fed. R. Civ. P. 12(b)(6), than as a failure to invoke federal jurisdiction, see Fed. R. Civ. P. 12(b)(1).

include "a person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities," 38 U.S.C. § 4303(4)(A)(i) (emphasis added), and the supervisors are persons. The USERRA cause of action, however, arises against "a State (as an employer)." *See id.* § 4323(a)(2). Individual supervisors are not included in the definition of "State." *See id.* § 4303(14) (defining "State"). Although the cause of action can be brought against a "State (as an employer)," "as an employer" describes the capacity in which the State can be sued; it does not create a cause of action against individual state employees even if they exercise supervisory responsibility. Thus, an action under USERRA is

available only against the State "as an employer," and not in some other capacity. In any event, even if the individual supervisors are a "State (as an employer)," that action, as we have already noted, would be limited to state court. Thus, Townsend's attempt to sue individual supervisors under the cause of action which the Act provides against a "State (as an employer)" fails.

[13] Nor are the individual state supervisors "private employers." While the supervisors may fit under the definition of "employer," we agree with the district court that it would do violence to the language of the statute to consider a state employee-supervisor a "private employer."

2. Implied Cause of Action

[14]We next consider whether there is an implied private right of action against an individual state supervisor under USERRA. *See Williams*, 500 F.3d at 1022. To determine whether a private right of action is implied in a federal statute, we employ the four-factor test under *Cort v. Ash:*

First, is the plaintiff one of the class for whose especial benefit the statute was enacted-that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally

relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

422 U.S. 66, 78 (1975) (internal quotation marks and citations omitted).

The first factor weighs in favor of finding an implied cause of action: USERRA clearly creates federal rights for service members like Townsend. "However, 'even where a statute is phrased in such explicit rights-creating terms, a plaintiff suing under an implied right of action still must show that the statute manifests an intent to create not just a private *right* but also a

private *remedy* [in federal court].'" *Williams*, 500 F.3d at 1023-24 (quoting Gonzaga Univ. v. Doe, 536 U.S. 273, 284 (2002)).

[15]Given that cautionary note, the second factor, whether there is congressional intent to create a private right of action in federal court, is generally determinative. *See id.* (citing *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001)). Here, Congress manifested no intent to create a private right of action against state supervisors. Indeed, by designing such a detailed express remedial scheme, Congress evinced an intent *not* to create an additional individual cause of action against state supervisors. *Cf. Seminole Tribe*, 517 U.S. at 74 ("[W]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Exparte Young*."). And, as we have noted, nothing in the legislative history suggests an intent to create a cause of action against individual state supervisors.

[16]Thus, the structure of USERRA and its legislative history make plain that Congress did not intend to create a cause of action against state supervisors. We therefore conclude that the district court did not err in denying Townsend leave to amend his complaint because such an amendment would be futile.

V. CONCLUSION

Section 4323(b) plainly places private suits against the state in state court. And § 4323(b) certainly does not evince an

unequivocal intent to abrogate the states' sovereign immunity. Townsend's attempt to find implied concurrent jurisdiction in the "may" and "private employer" terminology falls far short, and his attempt to fashion a claim against individual state supervisors also fails.

The judgment of the district court is

AFFIRMED.

APPENDIX - B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP. 30, 2008

MOLLY C. DWYER,
CLERK OF COURT
U.S. COURT OF
APPEALS

ROBERT DAVID TOWNSEND,

Plaintiff – Appellant,

v.

UNIVERSITY OF ALASKA;
UNIVERSITY OF ALASKA AT
FAIRBANKS,

Defendants - Appellees

No. 07-35993
D.C. No. CV-06-00171-TMB
District of Alaska, Anchorage

MANDATE

The judgment of this Court, entered 9/5/08, takes effect this date. This constitutes the formal mandate of this Court issued pursuant to Rule
41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

Molly C. Dwyer
Clerk of Court

By: Lee-Ann Collins
Deputy Clerk

United States Court of Appeals for the Ninth Circuit

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Case Number: 07-35993

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